

RIGHTS AND DUTIES*

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"We hold these truths to be self-evident: that all men are created equal and are endowed by their Creator with certain inalienable rights." This statement, in spite of literal inaccuracy in its every phrase, served the purpose for which it was written. It expressed an aspiration, and it was a fighting slogan. In order that slogans may serve their purpose, it is necessary that they shall arouse strong, emotional belief, but it is not at all necessary that they shall be literally accurate.

A large part of each human being's time on earth is spent in declaiming about his "rights," asserting their existence, complaining of their violation, describing them as present or future, vested or contingent, absolute or conditional, perfect or inchoate, alienable or inalienable, legal or equitable, *in rem* or *in personam*, primary or secondary, moral or jural (legal), inherent or acquired, natural or artificial, human or divine. No doubt still other adjectives are available. Each one expresses some idea, but not always the same idea even when used twice by one and the same person. They all need definition in the interest of understanding and peace.

In his table of correlatives, Hohfeld set "right" over against "duty" as its necessary correlative. This had been done numberless times by other men. He also carefully distinguished it from the concepts expressed in his table by the terms "privilege," "power," and "immunity."¹ To the present writer, the value of his work seems beyond question and the practical convenience of his classification is convincing. However, the adoption of Hohfeld's classification and the correlating of the terms "right" and "duty" do not complete the work of classification and definition.²

* The present article is intended to be analytical and descriptive only. An attempt will be made to show what sorts of societal action or inaction justify us in using the terms "right" and "duty," but not what motives and causes underlie this societal action or inaction. The explanation of the latter will be found in an understanding of the *mores* of a people and the evolutionary process of their development.

¹ Hohfeld's work has been published by the Yale Press in a volume entitled *Fundamental Legal Conceptions* (1923). It is also found under the same name in (1913) 23 *YALE LAW JOURNAL*, 16; (1917) 26 *ibid.* 710.

² The word "right," as everyone knows, has many meanings. The Century Dictionary recognizes at least twenty as an adjective and ten as a noun. To a less extent this is also true of the word "duty." Nevertheless, the use of "right" as correlative to "duty" marks a very great limitation, one that is difficult for the human tongue, accustomed to a confusion of some twenty meanings, to observe strictly. It would be possible to abandon the word to its very loose and shifting significance. Such inclusive terms, of variable connotation, render

As a working definition, let us suggest that a jural right is a relation existing between two persons when society commands that the second of these two shall conduct himself in a certain way (to act or to forbear) for the benefit of the first. A "right" exists when its possessor has the aid of some organized governmental society in controlling the conduct of another person. The first is said to have a "right" against the second and the latter a "duty" to the first.

In this definition the term "society" may be troublesome. Some would prefer "state" to "society."³ We need not here attempt a final choice among terms or definitions; but in using the term "society" or the word "state" the writer does not mean to denote any personified sovereign unit. If such a unit exists its "command" and its punitive sanctions create jural rights and duties.⁴ As used and defined in this article, jural rights and duties require only some group of persons, organized for governmental purposes, and represented by agents whose reaction to specific facts, for and against individual persons, can be predicted with reasonable certainty.

some service, even though they also promote uncertain concepts and inaccurate reasoning. The less we realize this uncertainty and inaccuracy, the more we cling to general expressions like "my rights."

Hohfeld, indeed, considered substituting the word *claim* for "right" as the correlative of "duty." The present writer is not unwilling to agree to this substitution if it should be pressed by others, although he believes that it would tend to perpetuate our habitual contentment with uncertainty of concept and inaccuracy of results. In the present article, "claim" is not substituted for "right"; and as will appear from repeated definitions in the text, "right" is used in Hohfeld's restricted sense as the correlative of "duty."

*Some would even personify this conceptual monad, asserting for it an objective reality, crowning its beloved head with "sovereignty," endowing it with juristic omnipotence and with all the other qualities of the most up-to-date anthropomorphic deity. A "pluralistic" conception would suit others better, dividing up the royal inheritance among many contesting monads, each dissatisfied with its share and vigorously striving for an increase.

*If there are several societal organizations of men, acting at times together and at times in competition, each with its own commands and sanctions, each with its own enforcing agents and procedure, then each will be creating a set of rights and duties within its own chosen field. These last may at times directly conflict, one commanding "thou shalt," another "thou shalt not." Both are "law," as long as one has not definitely overpowered the other. There have been examples of this in our own juristic history. Common Law and Equity thus conflicted, and not even the resolution of King James I to back Lord Ellesmere against Lord Coke entirely quenched the conflict. The conflict between State and Nation was ended by the Civil War; but there is still a twilight zone of conflict that is capable of causing new convulsions. New groups of individuals are forming and organizing, competing for power, commanding and sanctioning. Insofar as they can maintain themselves in the physical struggle, and insofar as their "societal" action can be predicted, it may logically be said that they are creating "rights" and "duties." Differences in degree are not negligible, however, and it may be inadvisable to dignify with the term "law" or the term "rights" the rules and sanctions of every association of lunatics or every criminal Mafia.

Other troublesome terms are "relation" and "commands." It does not help much to describe a right as a "relation." What is a "relation"? It is not a physical thing, but it involves physical relations of cause and effect. In the present instance, we mean merely that because of particular facts we can predict certain detrimental consequences to B if he does not conduct himself in the specified way, these consequences being action (or more rarely, inaction) by a few individuals as the agents of society. Experience has led us to believe that there is a uniformity in human behavior such that we can construct rules thereof and can predict consequences of facts with reasonable confidence. When we say that society "commands" we do not mean that someone is shouting hortatory words at B from a housetop or from a throne, although there may be such an actual shout (as when the traffic policeman says "stop" or "move on"). We mean generally no more than that there is in some degree a uniformity of societal action and that unless B conducts himself in a certain manner this societal action will be detrimental to B.

There are, however, various kinds of rights and they must be classified. The societal action detrimental to B may be impending either more or less immediately in time and with a greater or less degree of certainty. Furthermore there are many different kinds of societal consequences constituting the sanction or penalty for disobedience. It is possible, therefore, to classify our "rights" both in accordance with the facts determining the immediacy and certainty of the penalty and with the character assumed by that penalty. The degree of uncertainty may be so great, or the penalty become so slight, that we cease to describe the situation by the terms jural right and duty. Here, as elsewhere, our most important concerns depend upon distinctions of degree. The classifications attempted by means of the adjective modifiers mentioned at the beginning are mainly of this sort. Some consideration will first be given to these common terms.

Divine rights. No recognition can be allowed to such a term as "divine right." It profits little, in our abysmal ignorance, to trace "rights" back to a first cause that is itself quite beyond any finite imagination. Of course, it is just as easy to throw upon the Creator responsibility for our legal and social system as for the physical universe. But that is the only sense in which men are "endowed by their Creator" with any rights; and in that sense men are endowed by their Creator with all of their rights without exception. We cannot find some that are supernatural or divine while others are not. Some are of more value than others and some are more nearly universal than others, but the basis of classification is value and generality of enjoyment, not divinity.

Natural rights. Not much more need be said of "natural" rights than of supernatural or divine rights. Probably the terms often express the same idea. Some persons prefer to use the word nature instead

of God or Creator to express that which they do not understand. It has long been the custom, when a limited human intelligence conceives of something that for the moment seems extremely desirable, to describe it by such terms as divine, perfect, ideal, natural. In the law, the appeal to "natural justice" had its day. Perhaps the idea originally behind that term was justice "in a state of nature," as men were created before the fall, in the good old golden days. That day is past; the "state of nature" is being forgotten; we are beginning to express our notions of what is desirable by new phrases (e. g. "social justice").

As the term "natural justice" has been used in the recent past,⁵ its connotation is reasonably close to that of the newer term "social justice," although the latter seems to distinguish more specifically between the individual and the group. The assertion of "rights" and the appeal to justice, whether "natural" or "social," no doubt often rest upon an assumption of an eternal system superior to the will of man and to human legislation. If such a system exists, it is as yet beyond human knowledge. In invoking such a system as a basis for decision, we are merely applying our own social standards and the *mores* of our own "chosen" people and asserting for them the quality of universality and perfection. In fact they have no such quality. The standards, the *mores*, and the justice of yesterday are not those of to-day. It is true that some standards and some of the *mores* are common to many peoples and perhaps to the whole period of recorded history. In these cases we can predict for the future with some confidence. This merely shows a variation in degree, however; and it remains true that for most litigated questions the past has no uniform

⁵ In *Rex v. Local Government Board* [1914, C. A.] 1 K. B. 160, there was a statute providing that the Local Government Board "may by rules determine the procedure of any appeal." (1909) 9 Edw. VII, c. 44, sec. 39. Buckley, L. J., said (p. 185): "Such rules must be rules consistent with natural justice. For instance, the Board could not make a rule, (1) that neither the appellant nor the local authority should be heard orally or in writing or in any manner whatsoever; nor (2) that each should be heard but only in the absence of the other; nor (3) that neither should be informed of the facts alleged or arguments advanced by the other. These would each and all be contrary to natural justice." Hamilton, L. J., (in a dissenting opinion) referring to foreign judgments and the expression "contrary to natural justice," said (p. 199): "It has often been pointed out that the expression is sadly lacking in precision. At one time it was regarded as setting up for foreign jurisdictions a standard of judicial correctness upon the pattern of our common-law Courts, but times have changed. In *Buchanan v. Rucker* (1807) 1 Camp. 63, 66, Lord Ellenborough at nisi prius declared that the practice of the Law Courts of Tobago to summon a defendant who was out of the jurisdiction and never had been within it, by nailing the writ on the door of the court-house 'is contrary to the first principles of reason and justice . . . it is mala praxis, and cannot be sanctioned.' Nevertheless, this weighty opinion, which having regard to the circumstances seems, I must say, to be very temperately expressed, was coldly dismissed as 'declamation' by the Court of Queen's Bench in *Schibsby v. Westenholz* (1870) L. R. 6 Q. B. 155, 160."

answer and the future will answer in its own good time and manner. "Natural justice" and "social justice" are merely the system of the time and place, based upon the *mores* of the particular people involved, as those *mores* have developed and survived in the people's rigorous struggle for existence. In this sense, "natural justice" is an ever-living source of law and of "rights;" but it should be recognized for what it is—a complex system of human notions, variable with the people and changeable with time.^{5a}

Inherent rights. An appeal is still occasionally made to "inherent" rights.⁶ These are usually identical with "natural" and "divine"; but the term may also at times carry some crude, figurative notion of a physical "inherence." Like "divine" and "natural," the term "inherent" has helped to make a good slogan. It is of no service to classification and it renders a disservice to understanding.

Moral rights and duties. Much space has been devoted to explaining differences between morality and law, between moral duty and legal duty. Perhaps there is reason to expect more violent disagreement here than with the previous paragraphs. It may be observed first, however, that the distinctions between moral rights and legal rights are identical with those between moral duties and legal duties, although the latter are the terms more commonly discussed, and that the term "legal" means jural, or juristic, and does not involve different systems of law such as canon law and civil law, common law and equity. It is believed that there is no exact and well-defined line separating the moral and the legal fields. When we say that A has a right against B and that B owes the correlative duty to A, we mean that the other individuals with whom A and B are associated, whether the individuals are more or less numerous and the territory occupied greater or less in extent, require B to act in a certain manner for A's benefit and will themselves act to

^{5a} Thus, in (1923) 39 LAW Q. REV. 518, Sir Frederick Pollock writes: "The law of nature is not a chaos of individual opinions but a tradition of universal reason confirmed by the general custom of civilized mankind." "Natural justice, founded in reason and verified by the usage of just men, is recognized and applied by judicial authority no less than the rules of international law, which ultimately rest on the same ground." As indicated above, "individual opinions" often agree, and there is a "tradition" that easily leads us into the false notion of "universal reason." Every people is easily convinced, inasmuch as the verification is by "civilized mankind" and by "just men," and those terms just describe *us*.

See *Surocco v. Geary* (1853) 3 Calif. 70, where the court says: "The right to destroy property, to prevent the spread of a conflagration, has been traced to the highest law of necessity, and the natural rights of man, independent of society or civil government The common law adopts the principles of the natural law"

⁶ "The so-called right to hold office is not a natural or inherent right. It is a privilege which arises from the organization of our civil society. If there is nothing in our fundamental law guaranteeing the privilege, then the people, through their official agency, the Legislature, may take it away." *Crampton v. O'Mara* (1923, Ind.) 139 N. E. 360, 362.

the detriment of B if he does not act as required. This is the case whether we describe A's right and B's duty as moral or as legal. The difference lies in the form that the detrimental action takes in case B disregards the requirement; it lies in the "sanction" and only in the "sanction." If it consists of action in accordance with some rule of general application by the executive or judicial representatives of an organized governmental society, the right and duty being enforced are recognized as jural. If the action detrimental to B is solely by individuals who are not representatives of such a society, the right and duty, if any, are moral. It may be difficult at times to determine whether an individual is acting as an official representative of society. We shall consider below some of the various kinds of sanctions, of detrimental action by our fellow men, and shall express an opinion as to which ones justify the use of the term moral right and which the term legal right.

Equitable rights. Juristic rights have been very generally divided into two classes known as legal and equitable. It is not easy to find any attempt at exact definitions of these. It is probable that, as the terms are used, exact definition is impossible. The classification arose out of the fact that the law of England came to be determined in its major part by a dual system of courts, by the Lord Chief Justice on the one hand and the Lord Chancellor on the other, the latter supplementing and modifying the work of the former. The Chief Justice's court (not meaning literally that it was *one* court) was the earlier in time, and its great work was the unification of English law, the gathering together of the mass of varying rules applied by local courts and courts of special jurisdiction and welding them into a common system. Thus the law of this great court came to be known as the common law of England. Thus the earlier law of various tribes, like the Saxon law and the Dane law, became nothing but historical sources; the local law of the barons, the sheriffs, and the cities was merged and forgotten; and even the law applicable to special classes of persons, like the law of the merchants, became eventually a part of the common system. After centuries of work by judges of the king's court such as Bracton, Coke, and Mansfield, the "law" of England was understood to be the system applied by the King's Bench and Common Bench. The adjective "legal" went naturally with the "law," and "legal rights" meant the rights of Englishmen under the common law. The unification was never complete, however, not even being fully accomplished by the Judicature Act of 1873. Prior to that statute there remained the Courts of Admiralty, the Church, and the Chancery, and perhaps others. Of all these, only the Court of Chancery had a system of law that applied so generally as to appear in the minds of men as a successful competitor with the great common law of the two Benches. Because of the political influence of the Chancellors and because of the character of the system they developed, the competition of equity with the common law was successful. Many of the rules of the two Benches were substan-

tially nullified by the Chancery, even before that fact was acknowledged by the judges themselves. Duties were imposed on individuals and rights created in others where the common law had left privileges and no rights.⁷ In other cases individuals were given privileges of action or inaction where the common law enforced a duty to act or to forbear.⁸ Facts were given different operation, constituting causes of action and defences unknown to the Benches. In spite of its measurably successful competition, however, the system of law applied in the Chancery was described as "equity" and not as "the law," many of its jural relations were called "equities," its rights were "equitable rights" as opposed to the "legal rights" of the common law, its "titles" were "equitable titles" as opposed to "legal titles" recognized by the Benches.

The jurisdiction of the Chancellor was just as wide territorially as that of the Chief Justice. The law of the Chancery was as truly deserving of the adjective "common" as was that of the Benches; indeed, both systems are no doubt generally included under the one name when the common law as a great system is being compared with the civil law of Rome.

It should be remembered that the law of England was never in fact a *dual* system of law and equity. It could not have been so before the development of the Chancery as a court; and even thereafter there was a remnant of jurisdiction left to the Admiralty and to the Church, each with its own sanctions and its own procedure. It should be remembered further that while there has been the constant tendency toward unification by the welding of law and equity through both legislative and judicial action, there has been an even greater development toward complexity and conflict due to the multiplication of independent political jurisdictions. Canadian law is not that of England, the law of Ontario is not that of Quebec, the law of Illinois is not that of New York. Thus, while the line between law and equity has become blurred and is disappearing, distinctions between Illinois rights and New York rights have been increasing.

Rights vary with the community. As said heretofore, the existence of a right in A against B and of a correlative duty in B to A means that the organized fellow citizens of A and B will act against B for A's benefit unless B conducts himself as required. These fellow citizens

⁷ For example, certain conduct by an occupant of land was forbidden by the Chancery as being waste, although not forbidden by the King's Bench. Many duties were enforced against a trustee by the former that were unknown to the latter.

⁸ This was true in all cases where certain facts, such as fraud or mistake, constituted an "equitable" defense but were no defense at common law. The King's Bench was ready to enforce its penalties against the defendant; the Chancellor prevented the plaintiff from asking for such enforcement until eventually the common-law penalties became practically negligible.

may be more or less numerous and the territory occupied greater or less in extent. A "right" does not have existence as a thing, independently of human individuals and a social organization. We cannot say once a right always a right, or here a right everywhere a right. Certain facts existing or events occurring in Ohio may be sufficient to cause the courts of Ohio, as the agents of the people of Ohio, to act against B for the sake of A, without being sufficient to cause the courts of Iowa to take any action whatever. In such case, A has an Ohio right against B, but not an Iowa right. The relations of Ohio with Iowa under our constitution, however, are such that usually the same facts will be legally operative in both states. A then has a right against B in both Ohio and Iowa.⁹ The same may be true in the case of two wholly independent states, such as France and England. This applies not only to rights, but to other jural relations, to privileges, powers, and immunities, and to complex combinations of them like the ownership of land or the status of marriage. A and B may be husband and wife in Ohio or in France, and be utterly divorced and unmarried in Iowa or England. It all depends, and it depends wholly, upon what the individuals of the organized community actually will do and hold themselves out as ready to do in the particular case. The sanctions and the proce-

⁹ Even though each of the two States or nations recognizes certain operative facts as creating a right in A against B, that right is not necessarily the same right in both places—that is, the performance required by B may not be identical. Also, both the remedies available and the procedure that is prescribed may be entirely different. In *Guinness v. Miller* (1923, S. D. N. Y.) 291 Fed. 769, a citizen of the United States sued to collect from a German on a stated account payable in marks. Learned Hand, D. J., said: "The sole question is whether the decree should be for the value in dollars of the marks when the account was stated, December 16, 1917, or for their value as of the date of the decree. In the case of tort committed in a foreign jurisdiction it is pretty clear that the judgment should be based on the exchange at the time of the loss inflicted. In such cases we are familiar with the idea that his wrong imposes on the tortfeasor an obligation to indemnify his victim in money. A court of the sovereign where the tort occurs enforces this obligation in the money of that sovereign, regardless of its change in value, merely because those are the terms in which it is cast. When a court takes cognizance of a tort committed elsewhere, it is indeed sometimes said that it enforces the obligation arising under the law where the tort arises. And, if this were true, it would seem to follow that the obligation should be discharged in the money of the sovereign in whose territory the tort occurred, and that the proper rule would be to adopt the rate of exchange as of the time of the judgment. However, no court can enforce any law but that of its own sovereign, and, when a suitor comes to a jurisdiction foreign to the place of the tort, he can only invoke an obligation recognized by that sovereign."

The court held that the debtor's American duty was to pay the value of the promised marks in dollars as of December 16, 1917; but the German duty could be discharged by paying in German marks of the sort current in 1923. The same facts create these duties, but the duties are not the same. The court truly said: "Each court is enforcing a different obligation, imposed by a different sovereign, necessarily defined in terms of its own money."

ture in the two communities may be very different, just as they were in the case of the Chancellor and the Chief Justice. Even if the sanctions are identical, some of the accompanying jural relations may not be so.

Property rights. The distinctions between rights *in rem* and rights *in personam* are no more certain and no more generally agreed upon than are the distinctions already discussed. "Property" rights are among the rights said to be "*in rem*"; contract rights among those "*in personam*." Nevertheless, a contract right is also said to be "property." Such a classification is clearly a rough one, with a blurred boundary between, and it fails to be of service in many an emergency. Sometimes we think clearly and specifically of the comparatively simple jural relations between two persons, A and B. What will society do for A against B alone? At other times we think loosely and generally of the complex jural relations between A and an indefinite number of other persons not specifically identified.¹⁰ What will society do for A against whom it may concern? In either case, however, when the societal action occurs it will affect specific individuals. If A "owns" land, with rights "*in rem*," he has a right against B that B shall not trespass, as well as similar rights against others. B is under a duty to A not to trespass. A's right against B is just as *personal* as it would be if B had contracted not to trespass, and as it would be if B were the only person under such a duty. There are very important differences between the procedure by which property rights and other rights "*in rem*" can be affected and the procedure for affecting rights "*in personam*"; but in both kinds of rights alike there is the command of society to an individual with threat of societal action against him for A's benefit. Even where procedure is "*in rem*," as in an admiralty proceeding "against a ship," it is the jural relations of individuals that are being affected. The ship may be sold and title given to a buyer. The owner of the ship formerly had a right against B that the latter should not trespass. Now he has that right no longer. The same is true of rights that the owner had against other persons. We describe the total by saying that the owner's "title" is gone and his rights "*in rem*" are extinguished.¹¹

¹⁰ See Hohfeld, *Fundamental Legal Conceptions*, *supra* note 1, also found in (1917) 26 YALE LAW JOURNAL, 710; Kocourek, *Rights in Rem* (1920) 68 U. PA. L. REV. 322.

When a contract right is said to be "property," this does not mean that the contract right is itself a "property right." The word "property" is then being used in the sense of "subject matter" or *res*. As such a *res*, a horse is "property"; but a horse is not a "property right." The value of the contract right to its holder is protected by the creation of additional rights against innumerable and unidentified third persons that they shall not interfere with performance. These are the "property" that one has in his "contract."

¹¹ It would be an extremely useful social achievement if people could be made to understand that "property" rights (rights *in rem*) are just as *personal* as are contract rights and other rights *in personam*. In the Century Dictionary, a right *in rem* is defined thus: "the legal relation between a person and a thing

Inalienable rights. When a right is said to be "alienable," the meaning is usually the same as that expressed by assignable. This meaning is that the holder of the right has also a power of substituting another person in his place, of extinguishing his own right and creating a like one in the person substituted. Practically every contract and property right has come to be alienable in this sense. "Alienable" may also be used to mean that the holder of the right has the power to extinguish it without any substitution of another holder. Such a power is exercised when a creditor executes a discharge of his debtor. There are some rights that are not alienable in either of the foregoing senses, such as the right not to be stabbed with felonious intent and the right not to be robbed, the inalienability in such cases resting on prevailing notions of public policy. "Inalienable" may also be used in a third sense, that the power of extinguishment does not exist in persons other than the holder of the right. Such a power of alienation often exists with the assent of the holder of the right, and sometimes without his assent. Thus, the power to assign or to discharge is often intentionally conferred upon an agent. If one steals my money I still have property rights, and yet the thief has power to extinguish them by paying the money to an innocent taker for value. In addition to this, every right without exception can be extinguished totally by the withdrawal of the societal sanction. If the term "right" is used as defined herein, connoting nothing but a societal command and sanction, it is clear that those who issue the command can countermand it and that those who threaten the penalty can withdraw the threat.¹² Thus disappears any supposedly

in which he has an interest or over which he has a power, as distinguished from a right *in personam*, or the legal relation of a person to another who owes him a duty." A great deal of declamation against the supposed failure to prefer "human" rights over "property" rights is based upon the same error that the Century here makes. All jural relations are between persons, either as individuals or in groups. "Things" do not have rights, and there is no "legal relation between a person and a thing." "Thou shalt not steal" is a rule of property; but its operation is wholly for persons and against persons, just as in the case of the rule "Thou shalt not kill." Every "property" right of A has its correlative duty in some other person B and operates *in personam*.

Like all other rights, property rights have been developed in the evolution of humanity as a means of human survival in comfort, for the sake of "life, liberty, and the pursuit of happiness." It does not follow from this that they are "divine" or unchangeable; on the contrary it follows that they are "human" and are subject to criticism and alteration. Emotional criticism and unintelligent alteration are certain to result in the destruction of existing wealth (subject matter) and the non-production of more, with resulting "human" misery and death. Mossback resistance to intelligent alteration has the same result.

¹² Some "rights" in the United States are accompanied by constitutional provisions depriving the States or Congress of power to annul them. In such cases the societal sanction can be withdrawn and the right destroyed only by those having the power to amend the constitution. By such amendment, however, we can be deprived of our most cherished rights.

Fundamental rights. It has been argued that citizens have rights so "funda-

"inalienable right to life, liberty, and the pursuit of happiness." The writers of the great Declaration may have thought their rights "inalienable" by King George or by Parliament because they believed in some "natural" or some "divine" sanction. Very likely, however, they meant merely to tell the world that they had a violent desire for life and liberty and for the opportunity to pursue happiness without a stamp tax, and that for these things they were ready to pledge their "sacred honor," and even the "lives" to which they asserted an inalienable right.

Future and conditional rights. The pairs of terms "future or present," "vested or contingent," "absolute or conditional," and "perfect or inchoate" can advantageously be discussed together. As the term is herein used, a "right" in A against B means that "society" commands B to act or to forbear, with some penalty for disobedience. This command of "society" is caused by the existence of certain *facts*. It will not be attempted here to explain the meaning of causation, or why out of the sum-total of antecedent facts we pick out a few and describe them as the "cause." This process is universal, however; and upon it our system of law is based. These causal or "operative" facts, as they are called herein, may be numerous and they may not all have occurred or as yet exist. Thus, in the case of a loan of money by A to B, the delivery of the money to B and the promise of B to repay are among the operative facts; but so also is the arrival of the date of maturity. Prior to that date, but after the loan and the promise, we say that B owes a debt to A. "Society" commands B to pay A *at maturity*. Perhaps this relation of B to A can be described conveniently as a *future* duty. Action by B is not expected at once and his non-action will not be penalized in any way. After maturity, however, instant action is expected and non-action will be penalized if the necessary procedure is taken by A. This is the difference between "future" and "present" rights.

mental" in character as to be beyond extinguishment by any societal organization. This amounts to no more than an appeal to "God." More often it has been asserted that certain rights are so "fundamental" that the power of a State or of Congress to "alienate" them has been taken away by the constitution (especially by the fourteenth amendment). There have been some attempts to enumerate these "rights," usually including all sorts of jural relations and factual interests. See *Corfield v. Coryell* (1825, C. C. Pa.) 4 Wash. C. C. 371, 380, Fed. Cas. 3230. Such limitations on the powers of legislative bodies are to be determined by the usual methods of constitutional interpretation. They may exist; but it is to be observed that the attempts to establish them have usually failed. See *Slaughter-House Cases* (1872, U. S.) 16 Wall. 36 (argument of the minority); *Spies v. Illinois* (1887) 123 U. S. 131, 8 Sup. Ct. 22; *Maxwell v. Dow* (1900) 176 U. S. 581, 20 Sup. Ct. 448, 494; *McCray v. U. S.* (1904) 195 U. S. 27, 24 Sup. Ct. 769; *Waugh v. Board of Trustees* (1914) 237 U. S. 589, 37 Sup. Ct. 720. The term "fundamental" merely indicates the degree of importance with which the right so described is regarded by those wishing to preserve or to possess it.

All "present" rights in the sense above stated are also "vested," "absolute"¹⁸ and "perfect" as those terms are customarily used. "Future" rights, however, are not necessarily so. In the creation of a right the operative facts seldom if ever occur at a single moment of time; they are instead a number of facts occurring in a series chronologically. If all the operative facts exist or have occurred with the exception of the passage of some fixed time, the right is a "future" right, but we do not refer to it as conditional, contingent, imperfect, or inchoate. Instead, we call it "vested" and "unconditional." If, however, some act or some event other than the passage of time must occur before society will regard its command as disobeyed, then the right and duty are not only "future" but are also "conditional."

Consider the following cases: (1) A holds B's note for \$100, payable upon the death of X. The operative facts constituting mutual assent, consideration, and delivery have occurred. But the death of X is also a necessary event and it has not yet occurred. It is said to be a condition precedent to A's presently enforceable right; and meantime A's relation to B is called a "conditional" right. This condition is one that is certain to occur, but at an uncertain time. A's right would be described as "vested," if that term is to be used at all with respect to rights "*in personam*."

(2) A holds B's note for \$100, payable upon the arrival of the ship "Titanic." Here again, all the operative facts except one have occurred; but that one is not certain to occur at any time. Nevertheless we say that A has a "right" and describe it as "conditional." Our ordinary legal terms do not differentiate it from A's right in case number (1).

(3) A holds B's promise under seal to pay \$100 upon the delivery of certain goods by A. In this case the condition is an act of A, the holder of the "right." As in number (2), this condition may never

¹⁸"Absolute" is not always used as the opposite of "conditional." Thus the Century Dictionary defines "Absolute rights" as "those rights which belong to human beings as such; those rights to which corresponds a negative obligation of respect on the part of every one. They are usually accounted to be three—the right of personal security, of personal liberty, and of private property They are termed *absolute* in contradistinction to those to which corresponds the obligation of a particular person to do or forbear from doing some act which are termed *relative*." In substance, this makes "absolute right" identical with "right *in rem*." The Century cannot mean that "absolute" means "inalienable," inasmuch as many "human beings as such" daily have their rights of security, liberty, and property extinguished, both voluntarily and involuntarily. Further, all rights are "relative," in that they are relations with other persons and in that they are dependent upon the existence of facts.

The Standard Dictionary defines Absolute rights as "those rights that are inherent in the individual, inalienable and indefeasible; as man's absolute rights to life, liberty, and personal security." See also Langdell, *A Brief Survey of Equity Jurisdiction* (1887) 1 HARV. L. REV. 55. Austin, *Jurisprudence* (3d ed. 1869) 753, has an excellent criticism of the term "absolute rights."

occur, and its occurrence depends upon the will and physical capacity of A. Again we say that A has a "conditional" right.¹⁴

(4) A holds B's promise under seal to pay \$100 if B shall himself go to York. This is like number (3) in all respects, except that the occurrence of the conditioning fact depends upon the will and physical capacity of B, the promisor. A's relation to B is here less advantageous than in number (3) because B is legally privileged not to go to York. The "condition" depends upon B's will and not upon A's. Nevertheless, we still say that A has a "conditional" right.¹⁵

(5) A holds B's promise under seal to pay \$100 upon the death of C, if a premium shall be paid by A and if B shall continue in business. Here we have a combination of conditions. Numberless other combinations are possible. The same operative facts have occurred as in the preceding cases, but there are more operative facts still to occur. The greater the number, the greater the uncertainty and the less the value of A's right. There is a valid "contract," however, and A still is said to have a "conditional" right.¹⁶

In the five cases preceding, we have assumed that the operative facts necessary to what is called a valid "contract" have occurred. Had we assumed less, we should hardly be justified in saying that a "right" has been created. Thus, if one party makes an offer to enter into a contract of any of the foregoing sorts, but there has been no acceptance, no usage justifies us in saying that even a conditional right exists. And yet, one of the necessary operative events has occurred. The train of operative facts is started. Each of the remaining events is as necessary as another, is as truly a "condition" as any other. Usage, however—perhaps a somewhat arbitrary usage—fixes the point in the sequence of facts at which a conditional "right" is said to exist. Before reaching that point, we may perhaps be justified in using the vague term "inchoate right."¹⁷ It is doubtful whether this term renders any service of value.

¹⁴ The description of A's right would not be changed in case A had promised B in return to deliver the goods. Such a promise by A would be a new operative fact and would cause B to have a "right" as well as A, and A to have a "duty" as well as B. The "contract" would then be described as "bilateral."

¹⁵ See *Scott v. Moragues Lumber Co.* (1918) 202 Ala. 312, 80 So. 394.

If B has made a binding promise to A to go to York, this does not affect the description of A's right. Such promise gives A an additional "right" and B an additional "duty." It would not cause the "contract" to be described as "bilateral."

¹⁶ There are various advantageous classifications of these future operative facts called "conditions." See Corbin, *Cases on Contracts* (1921) 478. With the increasing complexity of human affairs and business agreements, new combinations are daily considered by the courts and new combinations of jural relations recognized. This is one reason why the old complex and general concepts of the law are no longer adequate for the analysis of a problem and for clear statement of its solution.

¹⁷ In *Michaels v. Pontius* (1922, Ind. App.) 137 N. E. 579, it is said: "The

In certain fields of the law the term "vested right" has played a part of some importance, but it is not a term that yields easily to definition. In the law of property, "vested" is contrasted with "contingent," as in the case of vested and contingent remainders. A "remainder," however, is a complex interest consisting of many jural relations, not of a simple "right." It requires a full analysis that will not be attempted here. A "vested" right does not mean solely an unconditional, present right. In constitutional law, perhaps, a "vested" right is one that under prevailing constitutions is not subject to confiscation; but this is true of many conditional future rights. Doubtless, rights are "vested" when there is not too great a degree of uncertainty as to the occurrence of the necessary conditions in the future. The exact line can be picked out only by empirically collecting the decided cases.

Absolute duties. The term "absolute" when applied to duties is sometimes given a meaning different from any that is given it when applied to rights. It is sometimes said that while a right never exists without its correlative duty, certain duties can exist without any correlative rights.^{17a} Such duties are said to be "absolute," not meaning that such duties are not relations with other persons, but meaning that such other persons do not have rights that are correlative to the duties. Examples given are the duty to abstain from cruelty to animals or from certain acts of immorality, and duties to a child yet unborn. It is believed that this distinction is unsound and that such use of the term "absolute" is unfortunate. The matter is of practical importance, chiefly because if there is inconsistency of language in this matter there is also an unclear concept behind the term.

The concept behind the term "duty" seems to be that societal pressure is put upon B to induce certain conduct by him—that the agents of an organized society will act to B's disadvantage if he does not conduct himself as desired. This societal action is taken—that is, "duties" are created—for the protection and satisfaction of human interests and

property in question [fixtures], having been placed on the leased premises in prospecting for oil, and operating the wells drilled thereon, gave the owner of the land covered by the lease an inchoate right thereon. If the lease is still in force, this right may be terminated by a removal of the property from the premises before the expiration thereof, or within a reasonable time thereafter, by the lessee, or someone deriving a right to do so from it; but if this is not done it will ripen into a vested right. The owner of the land, therefore, has an interest in preserving the property, which gives him and those claiming through him a right of possession as against mere trespassers, who may seek to convert the same to their own use, and thereby render such inchoate right valueless." This means that the lessor has a property interest, including present rights against third persons; but he has also a liability to their extinguishment by severance by the lessee.

^{17a} See Austin, *Jurisprudence* (3d ed. 1869) 67, 412; Markby, *Elements of Law* (6th ed. 1905) sec. 150; Korkunov, *General Theory of Law* (Hastings' Trans. 1909) 197, 211.

desires. The rules determining the action of the officials of society are designed for this purpose. It appears, therefore, that it would be possible in all cases to point out some human interest to be protected. Such an interest is an interest of men. It may be the interest or desire of one specified man alone, or of several specified men, or of some class of unspecified men, or of all men generally. In any of these cases there may be more or less difficulty in identifying the man or men in question; but in the last case where they are the most numerous it would seem that there is the least difficulty. These men with the factual interests to be protected are the men with the "rights." In the case of a "duty to the state" or "to society," the "interest" includes the common interests of all. Each member has his interest and that interest is protected. If that is what we mean by "right," then each has a "right." It is merely a case where many persons have rights against one and the one has a duty to each of the many. Like many other "obligations" to joint or joint and several obligees, the obligor's duty to each can be satisfied and extinguished by a single performance.

Where the duty is owed to one particular person, that person has a special interest, one in which others do not participate. It therefore looms large in his consciousness, and he it is who makes complaint of its infringement. Where the duty is owed to each of many—as where some person is cruel to his own beast—the breach does special injury only to those who witness the cruelty, and little to them if they are well hardened. In such cases, the many may have special officers appointed for purposes of detection and complaint.

It must be constantly remembered that in speaking of "rights" and "duties" we are not dealing with physical objects. We are merely stating that somebody's interests will be promoted by legal coercion of another person and that such coercion by societal action is obtainable. It is quite possible to define "right" so as to require the interest to be that of one specific person exclusively, and at the same time to define "duty" so as to include cases where the interests are those of many unspecified individuals. By such a definitional process, some duties can be made to appear "absolute"—not correlative to rights; but there will nevertheless in every instance be human individuals whose interests are being promoted by the societal coercion of the duty-bearer.

Primary rights. The existence of a "right" is caused by certain operative facts. Among these facts there may or may not be conduct by B amounting to a breach of a previous legal duty. If there is *not*, the right in question is said to be "primary"; if there is such a breach, the right against B is said to be "secondary" and "remedial." Thus, if B promises to pay A \$100 at a future date for money lent, A's right and B's duty are "primary." Likewise, A's right that B shall not trespass on A's land or that B shall not negligently injure A is so described. But if B trespasses on A's land or negligently injures A or breaks his

contract with A, there is a right to damages in A and a new correlative duty in B. This right and this duty are "secondary" and "remedial."

There are two substantial differences between the primary right and duty and the secondary right and duty. First, in order to make the secondary right, one new operative fact is added to those facts that created the primary right. Secondly, the performance required of B to satisfy the societal command is a different performance. In the case of a money debt, payment of the principal sum would extinguish the primary right and duty. After breach, interest (damages) must be paid as well as principal. In the case of a tort, B's primary duty requires a forbearance to act so as to harm A, while his secondary duty after commission of the tort requires the payment of reparation to A.

In some cases, on breach of his primary duty by B, that duty is extinguished and the secondary duty substituted. This means that the performance originally required of B is no longer required at all. It may not even be permitted. Such would be the case where B has committed a "vital" breach of a contract to build and A has acted upon the breach as final. In other cases, after breach, the primary and secondary duties exist together, the punitive action of society being directed toward securing the original performance due and an additional performance by way of damages. This is true in the case of money debts and also in the case of breaches of contract where time is not of the essence. The conduct required of B by the law is exactly what it was before the breach, although it can now occur only at a later time; and the legal sanctions are unchanged. This is what is meant by the statement that the primary right and duty still exist.

The "enforcement" of A's right and B's duty means the application of the sanction—the penalty—by societal agents. It is only in rare cases that this application causes B to perform exactly as and when his duty required. An injunction or a decree for specific performance in equity comes near it at times; but the decree sometimes fails of its purpose, and even when it succeeds, the performance is delayed and halting. This is true also in the case of a judgment in an action of debt. Occasionally the breach of a primary right may be successfully prevented by an injunction or by a police officer. The declaratory judgment no doubt sometimes has the same effect.

The foregoing may be equally true of both primary and remedial rights. Hanging a murderer does not prevent his particular crime. A judgment for damages does not prevent breach of the contract duty, and it may equally fail to cause B to pay the damages adjudged. That the sanction fails merely shows that not even "society" is omnipotent. Nevertheless, the agents of that society acted according to their habit; their behavior was as predicted, in aid of A and against B.

The judgment or decree of a court is a new and additional operative fact. It is sufficient of itself to create a right and duty. Generally,

it serves to liquidate and make certain that which before was unliquidated and uncertain. Sometimes the performance required by the judgment is different from that required by either the primary or the secondary duty. Even if not, it has a legal operation in other respects different from that of the pre-existing facts.

A and B and other litigants may have rights against societal officers and agents. These might also be called "remedial" rights; but there is little usage to warrant it. The jural relations of administrative officers with other citizens form the subject matter of administrative law. We shall not deal with them here, nor with the jural relations between citizens and judicial officers.¹⁸

VARIETIES OF SOCIETAL SANCTIONS

The next matter for consideration is the character of the societal sanction. What kinds of penalties justify us in saying that A has a jural right and that B has the correlative jural duty? There are differences in the severity of the penalty, even after its application has become certain and the right has become present, unconditional, and immediately enforceable. There are differences in the manner of administering the penalty and in the officers by whom it is administered. It is upon these differences, often a difference in degree alone, that the definition and classification of jural rights largely depend. We should follow judicial usage, and even popular usage, so far as this is not inconsistent or vague and therefore not suitable for clear thinking and accurate expression. The best approach is by considering in specific cases the consequences to an individual of his failing to do that which is said to be his duty.

In criminal law, penalties for wrongdoing vary all the way from death and physical torture down to a reprimand. If society commands B to act or to forbear under penalty of death or imprisonment or flogging or a money fine or even a reprimand by the court, we do not hesitate to say that B is under a legal duty to act or to forbear. Within these limits, at least, the legal duty does not depend upon the weight of the penalty. In each case, however, the infliction of the penalty involves affirmative action, by a representative of society, detrimental to B. In the law of torts and contracts the penalty for wrongdoing is usually money damages, this too involving affirmative action by judicial and executive officers of "the law." Again the existence of the jural duty does not depend upon the size of the penalty. It is not at all

¹⁸ There is some recognition of other varieties of rights and some use of other adjective modifiers. The writer has heard of "static" and "dynamic" rights, of rights "in possession" and rights "in action," but he is unaware of any general usage of the sort or any definite meanings. A "right" is not a physical chattel to be held or thrown; nor is it electricity or energy. There is merely a uniformity of human behavior enabling us to inform B that if he acts in a certain manner the minions of the law will get him, and to inform A that if B so acts the minions will punish B and perhaps compensate A. This is more briefly expressed by saying that A has a right against B and that B has a duty to A.

uncommon for "punitive" damages to be awarded in addition to "compensatory," both sorts being equally "punitive" in its broader sense as far as the wrongdoer is concerned;¹⁹ and statutes frequently allow double or treble damages.²⁰ However, the passage of a statute trebling the damages recoverable for a wrongful act has no effect whatever upon the duty itself the breach of which is the wrong complained of. It creates no new duty, but merely adds a new sanction to the existing duty.

Inasmuch as the existence of jural right and duty means nothing except that organized society affords a systematic remedy or remedies through its judicial and its executive or administrative officers, legislative action that abolishes all remedy and all sanction also abolishes the right and the duty. Legislation that abolishes only some of the remedies—part but not all of the sanction—does not abolish the right or the duty. The abolition of imprisonment for debt materially changed the remedy, but it did not extinguish the debt—the jural duty of the debtor. However, since some remedies are more effective than others for enforcing and securing performance of duty, a legislative change in remedies may gravely affect the value or advantage of a right to its possessor and the burden of a duty to its bearer.²¹ Our national constitution deprives the States of power to extinguish certain rights, privileges, and immunities, but not of power to vary existing remedies within reasonable limits. Legislation that affects only the procedure by which the existence of facts is established or the existence of jural relations is ascertained, no doubt also affects the value of rights, duties, and other jural relations; but usually not so directly as does a change of remedy.²²

¹⁹ Modern humanitarians often distinguish between revenge and prevention, between punishment and reparation. For our present purpose these distinctions are immaterial. When one person suffers harm at the hands of another he tends to react violently. His survival and prosperity depend largely upon the future prevention of such harm. His emotions are aroused, he feels indignation. This indignation will be described by his neighbors as "righteous" if they seem to be threatened with similar harm. Therefore, they take steps to prevent the harm by bringing about serious consequences to the harmdoer and by proclaiming that similar consequences will follow future harm of the same sort. Thus, a "sanction" is established and a "law" is made. Whether the "consequences" should be light or heavy is to be determined by their effectiveness to secure the desired object. But compensatory damages are awarded for the same general reasons as are punitive damages, fines, and imprisonment—to prevent similar harms in the future and to prevent private war.

²⁰ Thus, Conn. Gen. Sts. 1918, sec. 6144, gives treble damages against a thief or receiver of stolen goods in favor of the owner; sec. 6145, double damages to one injured by forgery; sec. 6146, treble damages for wilful removal of a bridge; sec. 6147, treble damages for injury to a milestone or guidepost; sec. 6148, treble damages for a vexatious suit. See also the Sherman Anti-trust law and laws giving remedies for infringement of Patents and Copyrights.

²¹ For example, see note 9, *supra*.

²² This indicates that distinctions between "substantive law" and "adjective law," or between "substance" and "procedure" are not so fundamental as is

It is not necessary to the existence of a jural duty that the sanction or penalty should consist of affirmative action by an officer. Suppose the only rule of law against homicide is this: Thou shalt not kill; if B shall kill A, B shall be *outlaw*, and anyone (X) is privileged to kill him and to seize his goods. Surely this would be sufficient to create a "duty" not to kill. The denial of the usual forms of protection, the extinguishment of "personal" and "property" rights possessed by B before his wrongful act, is itself a sanction and a penalty. Even if the individual (X) who hunts the outlaw to his death should not be regarded as a societal agent, the fact that the rule provides that the sheriff and other peace officers will not act against X for killing B operates as a heavy penalty and a preventive. It operates as a penalty in spite of the fact that B may escape from X. Any criminal may escape from jail or from the hangman. The one penalty that he cannot escape is being "outlaw."

According to international law if a neutral merchant vessel is ordered to stop by a belligerent vessel looking for contraband, the latter is privileged to fire at and to sink the former if she does not obey the command. Disobedience makes the neutral an "outlaw" to this extent. The extinguishment of the neutral's right of security and the creation of a legal privilege in the belligerent to send death and destruction seem to be an ample sanction for legal duty and to justify our saying that the neutral is under a "duty" to heave to when commanded: In this instance the privilege to fire is only temporary; if the neutral ship runs and escapes, the privilege of sinking her would not survive and no further penalty for her disobedience will be assessed.

By the Roman law, and perhaps also by our own, certain claims were enforced only by giving to the claimant a "lien" on goods in his possession.²³ The creation of a property interest, called a "lien," in the claimant marks an equal subtraction from the property interest of the

often believed; and yet reasonable distinctions can be drawn. Thus legislation may directly create or extinguish rights and duties or other jural relations. Such law is surely "substantive." Secondly, legislation may effect some change in remedies without creating or extinguishing any jural relation between private citizens A and B. Such legislation must, however, affect the jural relations between each of these individuals and the societal officers charged with administering remedial law. It gives to A or takes from him a right that the Chancellor shall issue an injunction or that the sheriff shall arrest B. This legislation is also "substantive," although falling within a sub-class called "remedial." [This seems to have been overlooked by the court in *Pusey & Jones v. Hanssen* (1923) 261 U. S. 491, 43 Sup. Ct. 454; COMMENTS (1923) 33 YALE LAW JOURNAL, 193.] Thirdly, legislation may affect procedure only, as by changing the burden of proof or by making an interested party a competent witness or by limiting cross-examination. This seems not to create or extinguish any jural relation between any two litigating parties.

²³ "Leaving out of account merely moral obligations, not recognised by law, not all which the law would enforce were equally enforceable. Most were enforceable by action, but there were a few cases in which the law did not allow an action but did allow enforcement in indirect ways. There were cases in which a claim could be enforced only by way of retention, not by action.

one benefited by the claimant's service. This lien is created immediately upon the service, and before the party served can be said to have committed a breach of duty. Therefore it is not a "penalty" for breach. It is nevertheless a means taken by society for "enforcing" the payment of a claim, and it can be said with some reason to amount to the recognition of a "right" and a "duty." Doubtless, some would here deny the propriety of using the latter terms, and would prefer to describe the situation by saying that the party benefited owes nothing and is under no duty, that he has merely lost that part of his property commensurate with the "lien" of the claimant but has the "power" to destroy the lien and to recreate his own original property interest by making a valid tender.

Is a creditor under a "duty" to a surety not to give an extension of time to the principal debtor? It seems proper to say that he is; but the only sanction or societal penalty for breach of such a duty is the extinguishment of the creditor's rights against the surety, and no affirmative action is taken by any officer against the creditor. Such a penalty operates, however, more beneficially to the surety and more detrimentally to the creditor than would a judgment for money damages. Indeed, the rule has been severely criticised because it penalizes the creditor severely in cases where his action may have caused the surety no loss whatever.²⁴

Is a depositor under a "duty" to his bank to examine returned cancelled checks and to notify the bank in case he detects forgery? His failure to do so has been held to extinguish his right to the sum paid out by the bank on a forged check in his name.²⁵ This is certainly a severe penalty for non-action.

Thus a defendant in a real action could resist the claim unless reimbursed for certain expenses, but could not recover them by independent action. There was the same right where a creditor sought to enforce a pledge against a bona fide holder The holder in *commodatum* or deposit had this right of retention apparently before he acquired an *actio contraria*, and at the beginnings of the contract of pledge this right of retention of the *res* was, it seems, the only right conferred by it." Buckland, *Roman Law* (1921) 407.

²⁴ See Cockburn, C. J., in *Swire v. Redman* (1876) L. R. 1 Q. B. Div. 536.

It might be argued that the creditor's right against the surety is merely a conditional one, the conditioning fact being his own forbearance to extend the time of payment to the principal debtor; that society does not make it the creditor's duty to forbear to extend the time, but merely puts it in his power to acquire a right against the surety by so forbearing. One answer to this is that such is not the language of the parties or their actual intention. The surety makes a promise to the creditor for a consideration. He regards himself as bound by a jural duty and the courts so regard him. His duty is conditional upon the failure of the principal debtor to pay at maturity; but it is not regarded as conditional upon forbearance to extend the time of payment. An extension of time is regarded as increasing the surety's risk that the debtor will not pay and as an injurious act, the penalty for which is the extinguishment of the surety's existing duty to the creditor.

²⁵ See Arant, *Forged Checks—The Duty of a Depositor to his Bank* (1922) 31 YALE LAW JOURNAL, 598.

Suppose that X represents to A that certain goods are his own and induces A to buy them, while the real owner B stands by observing the misrepresentation and its effect. Is B under a legal "duty" to A to warn him as to the true ownership? It may properly be said that he is; the "estoppel," the extinguishment of B's property interest, is the societal penalty inflicted for his wrongful silence. So also, if X falsely represents to A that he is the agent of B, with B's knowledge, it is said to be B's "duty" to speak the truth to A.²⁶ Yet the only penalty is that silence operates as a ratification.

A husband and father is said to be under a duty to support his wife and children. Affirmative sanctions have been invented to enforce this duty; but an operative sanction exists in the "power" created in third persons to create a duty to pay for necessities furnished to wife or child. The duty of a child to obey its parent is sanctioned by creating the privilege to spank.

In the immediately foregoing cases, the societal penalty or sanction consists in the creation of new and detrimental jural relations by rule of law alone without any affirmative judicial or executive action. Clearly distinguishable from these are the cases where a person's non-action is followed, not by injurious physical or jural deprivations, but only by a failure to make some possible affirmative gain. Thus if B discovers gold on the public domain, he is under no duty to pick it up. He has the legal power to make it his own; on his failure to exercise that power the law takes nothing from him. Again, B is under no duty to advertise his wares or to make offers, even though the result is that he makes no sales. For the same reasons, he is under no duty to accept offers made to him.²⁷ When A has broken his contract with B, and B can, by stopping work, easily prevent his loss from increasing, it is often said that B is under a "duty to mitigate damages." It has been judicially observed, however, that there is no such duty.²⁸ B's failure to mitigate his loss is not penalized by society. B's right to damages was created and the amount computed as of the time of A's final breach. Thereafter B's failure to discontinue work changes in no respect his jural relations with A. Of course, B is losing money by reason of his action;

²⁶ "The person with whom the agent dealt will so obviously be deceived by assuming the professed agent was authorized to act as such, that the principal is under a duty to undeceive him." 1 Williston, *Contracts* (1920) sec. 278.

²⁷ The offer creates a power of acceptance in the offeree; his failure to use it may prevent his making a gain, but this is not a societal sanction. The same is true of many jural powers. The holder of a life insurance policy is generally under no duty to pay the premium, although only by so doing can he create a right to payment by the company. In the same way the holder of a negotiable instrument is under no duty to give notice to an indorser; the latter has undertaken a conditional duty, and the holder has power, by fulfilling the condition, to make the duty unconditional.

²⁸ Burch, J., in *Rock v. Vandine* (1920) 106 Kan. 588, 189 Pac. 157. See also Scrutton, L. J., in *Payzu v. Saunders* [1919, C. A.] 2 K. B. 581, 596.

but so also does he lose money when he throws it into the sea, yet he is under no duty not to throw it there. A creditor loses a valuable right when he releases his debtor, but this loss is not a societal penalty for doing a wrongful act. Hanging is a societal penalty for murder; a suicide may reach the same result by hanging himself, but he is not being penalized by society.²⁹

The criterion of jural rights and duties that is here adopted seems to be quite inconsistent with any "sanction of nullity." It is readily admitted that the adopted criterion is not a *necessary* one, all others being "untrue." It is suggested merely as a criterion that works, one that is convenient and in harmony with generally prevailing usage. The usual distinctions between "void" and "illegal" contracts sustain it. A promise without consideration is void, but there is no duty not to make it. The making of such a promise has no effect whatever upon the action of officers of the law. Certain contracts of wagering or in restraint of trade have at times been unenforceable and void. Their making is not a breach of jural duty, however, unless the law goes further and declares that they will invalidate other agreements made in connection with them or affixes some other penalty. If "nullity" is included among jural sanctions, the field of right and duty would be greatly enlarged without advantage.

The societal sanction or penalty need not consist of affirmative action by "officers of the law"; and yet it must be such as to affect their action somehow and disadvantageously to the wrongdoer. Otherwise, we should have no distinction between legal rights and duties and moral rights and duties. In a number of instances above, the sanction consisted in a change in the jural relations of the wrongdoer: he became "outlaw" or he lost his property rights or he became bound by a contract. These changes in jural relations mean in every instance that the action of "officers of the law" will not be what it otherwise would have been. If their conduct will not be affected in any manner, we may be talking morality but we are not talking law. A parent who loves to lie about the accomplishments of his offspring may find that his neighbors shun his presence; but the police will not arrest him, the judge will not award damages, he has lost none of his jural rights as to person or goods. It is true that in socially ostracising him his fellow citizens are penalizing his conduct, often more severely than when the penalty is applied by the judges and the police. In each case the penalty is intended to discourage conduct regarded as undesirable socially. It is usage alone that justifies us in restricting the field of the law and

²⁹ The act of suicide may itself be a crime and there may be various societal penalties for attempting suicide or even for succeeding in the attempt. See Mikell, *Is Suicide Murder?* (1903) 3 COL. L. REV. 379.

In like manner the "duty" to retreat when attacked appears not to be a duty. Failure to retreat is not punished by any jural deprivation; but the person attacked has the power by retreating of gaining the jural privilege of hitting back.

jural rights and duties to the field of action of certain recognized societal agents.³⁰

Action by an irregular mob should never be regarded as action by societal agents, in spite of the fact that in some instances their feelings and actions will be approved by nearly the whole population. Such action is so lacking in uniformity that in general it cannot be predicted, it is confessedly contrary to the accepted rules, and it is generally disapproved of by the majority of people within the legislative territorial limits.

It is sometimes doubted whether international law is properly to be regarded as law, and it is suggested that rights and duties recognized by that system fall within the moral and not the jural field. This is because of the lack of organization in international or world society and because the sanctions of international law are perhaps less effective than are those applied within the separate nations. Organization, however, is not lacking. The Foreign Offices operate with great regularity as societal agents. Mixed Claims Commissions and other special international courts act in the same capacity with frequency. We have the infant League of Nations, The Hague Court, and the new World Court; and in addition there have been international congresses from time almost immemorial. There is no regularly organized police force, but we can point to examples of a *posse comitatus*. There exists a body of rules, some of which are as nearly certain to be obeyed as are the rules of national law. It is not easy, even within the field of national law, to draw the exact boundary line between morality and law, between moral rights and duties and jural rights and duties. It may be that the drawing of this line is more difficult in the international field; but the same tests are to be applied, and it is believed that there are suf-

³⁰ It is possible for individuals to exclude action by "recognized societal agents"—the judicial and executive or administrative officers—and thus prevent the existence of *jural* rights and duties although expressly creating *moral* rights and duties. In *Rose & Frank Co. v. Crompton* [1923, C. A.] 2 K. B. 261, the parties drew up a writing involving large sales of goods between England and America, covering a period of years. One paragraph was as follows: "This arrangement is not entered into, nor is this memorandum written, as a formal or legal agreement, and shall not be subject to legal jurisdiction in the Law Courts either of the United States or England, but it is only a definite expression and record of the purpose and intention of the three parties concerned to which they each honorably pledge themselves with the fullest confidence, based on past business with each other, that it will be carried through by each of the three parties with mutual loyalty and friendly coöperation." It was held that action would not lie for a breach. Bankes, L. J., said (p. 283) that "the document is only an honorable pledge, and that all legal consequences and remedies are excluded from it." In *Straus v. Cunningham* (1913, 1st Dept.) 159 App. Div. 718, 144 N. Y. Supp. 1014, a composition agreement was made whereby the creditors released the debtor from "all legal obligation," but the latter expressly reserved and continued "his moral obligation." See also *Smith v. Macdonald* (1918) 37 Calif. App. 503, 174 Pac. 80; *Monroe v. Martin* (1911) 137 Ga. 262, 73 S. E. 341.

ficient organization, sufficient sanction, and sufficient certainty in prediction to justify existing usage of the term "international law."

BREACH OF DUTY CONSISTS OF CONDUCT, NOT OF ITS CONSEQUENCES

It is of importance to observe that the "command" of society is always directed to the *act* of B and not to its consequences. B's breach of duty occurs at the time of his act or forbearance to act, not afterwards. There is no breach of duty *ex post facto*, depending upon the consequences. To act or not to act, that is the question for B to answer. The name that we apply to his act, the epithets that we hurl at B, and the amount of the penalty to be enforced against him may all depend upon the consequences of his act. But as already observed, a change in the amount of a penalty does not change the duty, and the existence of duty does not depend upon the size of the penalty.

Suppose that B shoots at A. This is called an "assault" at once; it will be called "battery" when the bullet hits A, and "homicide" when A dies a week later. The character of B's act, whether physical character or jural character, is the same whether A dies or not. B's act is complete, finished. But the societal action to be caused thereby depends, for various reasons, upon the subsequent event. The act of B was either a breach of duty when he fired or it was not. The same is true if we regard B's act from the standpoint of the law of torts instead of the law of crimes. B's act is a tort, irrespective of the amount of injury to A, if there is any injury at all. And yet the size of the compensatory penalty or sanction depends upon the subsequent suffering of A.

Duty to use care. It will be observed that in the foregoing case there is both a criminal and a civil sanction, involving affirmative action by officers of the law against B, from the moment of his action. A much harder case for analysis can be found in the field of negligence. Is there a legal duty on B to be careful? Is it B's duty to A not to be negligent? Able thinkers have certainly answered these questions in the negative. They say that B is legally privileged with respect to A to be as negligent as possible, provided no harm comes to A, that B's only duty to A is the duty not to cause him harm. It is difficult to combat these views; and yet an effort will be made to do so.

We must first exclude the question of B's "duty to society" (so called). Negligent conduct is sometimes made criminal irrespective of consequences, a sanction being provided that amply establishes the legal duty not to be negligent in the forbidden way. A test case is one where we can assume that B owes no duty whatever to society, but where A can get damages if and only if he is hurt. Can B commit a breach of duty to A by negligent conduct even though A is not hurt at all?

Suppose that B shoots a gun where shooting is not forbidden by law. A is in the vicinity, as B knows. B negligently shoots in such a direction that if A steps forward the bullet will hit him, and will not hit him

if he does not step forward. Should we make B's duty not to aim in that direction and pull the trigger dependent on the subsequent act of A? B's act is identical, whether A steps forward or not. He was equally negligent, whether A is hit or not. It was A's known position that made B's act negligent, and not A's stepping forward after B pulled the trigger. If A is hit, money damages show that B committed a breach of duty to him when B acted. This was a duty not to pull the trigger as and when he did. If A is not hit, there will be no money damages. Can it be that neither B nor anyone else can determine whether or not he is committing a breach of duty until the subsequent fortuitous action of A?

Three solutions of the problem suggest themselves: (1) B's duty not to pull the trigger is dependent on matter *ex post facto*. If A steps forward B's act was wrongful; if A does not step forward B's act was not wrongful. During the seconds of time after firing no one can tell whether it was wrong or not. (2) B was under no duty not to fire as he did; but after firing it was his duty to run with the bullet and prevent it from hitting A. (3) B was under a duty to A not to fire as and when he did, irrespective of whether A is hit or not.

Perhaps something can be said for each solution, and each has its difficulties. The second seems absurd; and the third will be adopted rather than the first for reasons following. The purpose of the societal command is the practical one of influencing the conduct of B so as to make the world a safer place for A. The command to B is to act with proper care at the time when he has physical power to affect results. There would indeed be cases where it would not be negligent to start a body in motion, but where on learning of A's proximity it would be negligent not to run after the moving body and stop it. There is no negligence, however, in not running after a bullet. The forbidden negligent act is the act that starts the bullet. The common form of expression is that it was B's duty not to shoot, to act carefully and not negligently, a duty that is breached when he acts. This is also the prevailing judicial form of expression.³¹ B's duty can be determined *ab initio* by comparing his proposed action with the standard of conduct set by the law—that of the reasonably prudent man. The character and the amount of the penalty may indeed be determined by matters *ex post facto*; but the *standard* is determined, not by these *ex post facto* consequences in the specific case, but by previous consequences in similar cases.

Is there a penalty of any character or any amount if the bullet does no harm to A? The definition of legal duty adopted herein requires some societal penalty for breach. The third solution of our problem cannot be accepted, therefore, unless we can find some sort of sanction or penalty, even in the case where A is not hit. In the case under dis-

³¹ Thus, in *Job Edwards v. Birmingham Canal Nav.* (1923, C. A.) 40 T. L. R. 88, 92, Scrutton, L. J., said: "I appreciate that to get negligence you must have

cussion, physical compulsion is quite possible, even before A is hit, although money damages are not. The command to B is to forbear to shoot, and it would be physically enforced if a policeman happened to be near enough. A court of equity would grant an injunction if circumstances permitted.³² It is not feasible to send out a policeman with every man carrying a gun in the woods or to get an injunction between rifle shots; but in the fortunate cases where the sanction happens to be

a duty to be careful, but I think that a landowner has a duty to take reasonable care not to allow his land to remain a receptacle for a thing which may cause damage to his neighbors."

In *Burke v. Cook* (1923, Mass.) 141 N. E. 585, in defining "gross negligence" the court says: "It amounts to indifference to present legal duty and to utter forgetfulness of legal obligations so far as other persons may be affected. It is a heedless and palpable violation of legal duty respecting the rights of others."

It should be observed that definition depends on usage. Where usage is doubtful or conflicting, it is desirable to mould usage. By adopting a particular definition we are not attaining any "ultimate reality" or the "nature of things." We are merely passing judgment upon what usage renders the best service. In drawing the line, in the *diminuendo* of societal sanctions, and restricting jural rights and duties to cases on one side of the line, it is not to be supposed that it is a necessary line or an inevitable classification. It is believed, however, that it is useful to draw the line and to adopt definitions so as to justify the greatest possible amount of judicial and popular usage, while at the same time avoiding vague or conflicting usage.

³² So far as the writer knows, this has not been established by decisions. The general principle is well established, however, that threatened irreparable injury will be prevented by injunction. "It is not necessary, before a writ to prevent a wrong can issue, that the wrong should actually have been committed." *Poppenhusen v. N. Y. Comb Co.* (1858, C. C. S. D. N. Y.) 4 Blatchf. 184, 187, Fed. Cas. No. 11, 281. See also *Vicksburg Waterworks Co. v. Vicksburg* (1901) 185 U. S. 65, 22 Sup. Ct. 585. In *Earl Ripon v. Hobart* (1834, Ch.) 3 Mylne & K. 169, 176, Lord Brougham said: "Proceeding upon practical views of human affairs, the law will guard against risks which are so imminent that no prudent person would incur them, although they do not amount to absolute certainty of damage. Nay, it will go further, and according to the same practical and rational view, and, balancing the magnitude of the evil against the chances of its occurrence, it will even provide against a somewhat less imminent probability in cases where the mischief, should it be done, would be vast and overwhelming."

The storage of gunpowder or other dangerous substance where negligent acts or natural processes are likely to cause irreparable injury will be prevented by injunction. See *Crowder v. Tinkler* (1816, Ch.) 19 Ves. 617; *Hepburn v. Lordan* (1865, Ch.) 2 Hem. & M. 345; *Fletcher v. Bealey* (1884) L. R. 28 Ch. Div. 688. In *Cowper Essex v. Local Board* (1889, H. L.) 14 A. C. 153, 160, Lord Halsbury said: "It is doubtless attributed to Lord Hardwicke that he once said 'the fears of mankind, though they may be reasonable ones, will not create a nuisance.' But if Lord Hardwicke ever really did say so it is quite clear that it is not now the law, if the fears are assumed to be reasonable. The existence of a large collection of explosive matter in the vicinity of a town has been held to be a nuisance. The good sense of mankind recognizes the fact that occasional negligence is one of the ordinary incidents of human life I do not think it is any answer to tell people who complain of the establishment of sewage works in their neighborhood that if and when the sewage works become a nuisance such works can be restrained by injunction."

practicable, it is also available for A's benefit. Neither the police nor the Chancellor is required to permit B's act and to await results before acting against B. Even in cases where no policeman is at hand and a bill in equity is impracticable, there is one sort of societal penalty that infallibly exists from the time of B's negligent act and before A is hurt. B becomes at once an insurer of A against loss; he is under a conditional duty to pay loss if it occurs. As already seen, the sanction of a legal duty may consist of some detrimental change in jural relations. The position of an insurer is detrimental in fact and in law. A promise to be an insurer, creating a conditional duty to pay money, is a sufficient "consideration" in the law of contracts, even though the event constituting the condition may never occur and the money never have to be paid. It involves what we call "risk." That it is detrimental to carry such a risk everyone knows. It causes the bearer of the risk to set aside a reserve fund, to re-insure at considerable cost, to alter his investments. The instant that B negligently shoots he becomes the bearer of this risk, this conditional duty, as a penalty for his rash act. That it is a real penalty, his own conduct often at once attests. He stands aghast at the chance of harm and the chance that he will be reduced to beggary by a heavy judgment. He runs away, even before he knows the result of his act. He knows that he *has done* wrong.

The duty of B to forbear from negligent acts is not a conditional duty; it is instant and unconditional. The time has come for instant action, without waiting for a single new operative fact. It is the particular penalty called compensation to A that is conditional on a future uncertain event. This uncertainty weakens the sanction, but it does not wholly eliminate it. B's secondary and remedial duty to pay damages to A is indeed subject to a condition precedent—A must be harmed; but B's primary duty to forbear from negligent shooting is subject to no condition precedent, nor will it be discharged by any condition subsequent.

The reasoning in the foregoing problem suggests an answer for another question in the law of negligence. Suppose that B negligently fired and that A negligently stepped forward into the bullet. Does B have the legal privilege of harming A in those cases where A is guilty of contributory negligence? The answer to this is no. Here again the command of society is directed to B and his acts, not to consequences. The particular penalty called compensation to A may be conditional not only on harm to A but on the absence of contributory negligence. No doubt society will forcibly prevent B's act when practicable, without regard to A's contributory negligence; and again B will occupy the position of an insurer from the instant he negligently shoots, his duty to pay damages being conditional on A's not negligently contributing (within the doctrine of "the last clear chance").